

In the Court of Appeals of the State of Alaska

Viktor M. Malyk,)	
)	Court of Appeals No. A-11958
Appellant,)	
v.)	Order
)	
State of Alaska,)	
)	
Appellee.)	Date of Order: January 4, 2019
)	

Trial Court Case # **4DJ-12-00012CR**

Before: Chief Judge Mannheimer and Judge Allard.

Viktor M. Malyk seeks rehearing of this Court’s decision in his appeal: *Malyk v. State*, Alaska App. Memorandum Opinion No. 6747 (December 19, 2018). Malyk contends that our decision was wrong in two respects.

First, Malyk asserts that, on page 8 of this Court’s slip opinion, we mischaracterized his argument regarding the trial court’s failure to give a factual unanimity instruction to the jury. In our slip opinion, we stated that Malyk contended that this was a “structural” error that would require reversal of his conviction even absent a showing of prejudice. In his petition for rehearing, Malyk correctly points out that he did *not* contend that this was a structural error; rather, he contended that this was a constitutional error, and that it was not harmless beyond a reasonable doubt. We will therefore amend our opinion to correct our erroneous description of Malyk’s argument.

Second, Malyk asserts that, in pages 12 through 15 of this Court’s slip opinion, we failed to adequately address his argument that the jury instruction on second-

degree sexual assault omitted a necessary element of the crime: that the sexual contact occurred “without consent”.

In our discussion of this point, we concluded that the jury instruction in question did not *omit* this element. Rather, we found that the instruction was, at worst, ambiguous as to whether “without consent” was a necessary element of the State’s proof. We further concluded, beyond a reasonable doubt, that this potential ambiguity was cured by the prosecutor’s summation to the jury — in which the prosecutor repeatedly told the jury that the State had to prove that the sexual contact was without consent.

In his petition for rehearing, Malyk contends that our resolution of the issue fails to adequately address the question of whether the flaw in the jury instruction was a structural error, given the Alaska Supreme Court’s recent decision on this topic in *Jordan v. State*, 420 P.3d 1143, 1155-56 (Alaska 2018).

Because neither Malyk nor the State has had the opportunity to brief the claim of structural error in light of *Jordan*, we now direct the parties to file supplemental briefs on this issue.

IT IS ORDERED:

1. On or before Tuesday, February 19, 2019, Malyk shall file a supplemental brief on the question of whether the flaw in the jury instruction was a structural error. This supplemental brief shall specifically address the holding in *Jordan* and how that holding affects the resolution of this case.

2. Thirty days thereafter, the State shall file a supplemental brief addressing these same issues.

3. The parties may seek extensions of time to file their briefs, but the automatic extension rules of Standing Order No. 12 do not apply to these supplemental briefs.

4. After this Court receives the supplemental briefs of the parties, we shall resume our consideration of this second portion of Malyk's petition for rehearing.

Entered at the direction of the Court.

Clerk of the Appellate Courts

M. Johnson, Deputy Clerk

cc: Court of Appeals Judges

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